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No. 80-1345

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KAISER STEEL CORPORATION,
Petitioner,

v.

JULIUS MULLINS, *et al.*,
Respondents.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Kaiser Steel has petitioned for a writ of certiorari to review a court of appeals decision that departs from the heretofore uniform rule that federal courts will not enforce illegal contracts. In their Opposition, Respondents take issue with only certain of Kaiser Steel's contentions, and their principal argument—that the illegality defense was properly denied to Kaiser Steel because other "remedies" were available—is based on a fundamental misunderstanding of the difference between remedies and defenses. We reply here to that argument and to Respondents' arguments regarding the conflict among the circuit courts and the propriety of the attorneys' fee award.

1. Respondents' Confusion Between Remedies and Defenses Lays Bare a Fundamental Flaw That Pervades Both Their Opposition and the Court of Appeals' Decision.

In Respondents' view, "[t]he crux of this case" is that "courts are not authorized to create *new remedies*" for antitrust or labor law violations.[1] For this reason, Re-

[1] Brief for Respondents in Opposition ("Opp.") at 7 (emphasis added). *See also id.* at 5, 9 & n.6, 10, 11, 12, 13, 14, 16, 17, 18, 19.

spondents argue, the court of appeals properly enforced the purchase-of-coal clause without deciding if it is illegal under the antitrust and labor laws. This concern with ensuring that Kaiser Steel is not afforded any new or unauthorized remedy is the central theme of Respondents' Opposition. It is also its central flaw.

Like the court of appeals,[2] Respondents lose sight of the fact that Kaiser Steel did not initiate this lawsuit or invoke the court's jurisdiction. Kaiser Steel never sought any "remedies" to redress violations of federal law. To the contrary, Respondents initiated these proceedings and sought from the court affirmative relief in the nature of specific performance. Kaiser Steel sought only to defeat the establishment by Respondents of a claim for relief based on a contract provision that violates the federal antitrust laws and has been declared by the federal labor laws to be "unenforcible and void."[3]

It has long been clear that a party may raise as a defense matters that it may not assert as an affirmative claim for relief. Indeed, it has repeatedly been held that a court that is without jurisdiction to decide an issue raised directly by a plaintiff may nevertheless decide the same issue when it is raised defensively.[4]

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[2] The court of appeals also was preoccupied with making certain that Kaiser Steel is denied additional "remedies." *See* Appendix at 18a, 19a, 20a, 21a, 22a, 23a, 24a, 25a, 26a, 27a-28a, 30a-33a.

[3] Section 8(e), Labor-Management Relations Act, 29 U.S.C. § 158(e) (1976).

[4] For example, a defendant may raise defensively, to defeat a plaintiff's action, a claim that would lie within the exclusive jurisdiction of another forum if asserted offensively in an independent action for affirmative relief (*see, e.g., Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977)); a claim that would be barred by the statute of limitations if asserted affirmatively (*see, e.g., Bull* v. *United States*, 295 U.S. 247 (1935)); a claim that would not satisfy the requisite jurisdictional amount if asserted affirmatively (*see, e.g., Lenz* v. *Wagner*, 240 F.2d 666 (5th Cir. 1957)); and a claim against the government that would be barred by sovereign immunity if asserted affirmatively (*see, e.g., United States* v. *Pusey*, 47 F.2d 22 (9th Cir. 1931); *Burgess*

Respondents fail to understand this distinction.[5] This failure infects their treatment of both the antitrust defense and the labor law defense.

a. *The Antitrust Defense*

Respondents rest their argument that Kaiser Steel may not raise the antitrust defense solely on their reading of this Court's decision in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959).[6] But Respondents' failure to distinguish remedies from defenses has led them to misunderstand that case.

In *Kelly*, the Court was called upon to enforce a lawful agreement for the purchase of onions. The defendant argued that it should be relieved of its obligations under that lawful agreement because a separate agreement between the parties (the so-called "nondelivery agreement") violated the antitrust laws.[7]

Performance (and thus enforcement) of the purchase agreement in *Kelly* would not have caused the defendant any antitrust injury; the defendant's injury arose entirely from the nondelivery agreement whose enforcement was not at issue. Nonenforcement of the purchase agree-

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v. *M/V Tamano*, 382 F. Supp. 351 (D. Me. 1974)). *See generally* Kaiser Steel's Petition for Certiorari ("Pet.") at 19-20 & n.29.

[5] This failure by Respondents is nowhere more apparent than in their reliance on *Transamerica Mortgage Advisors, Inc. (TAMA)* v. *Lewis*, 444 U.S. 11 (1979). Respondents argue, correctly, that *Transamerica* reaffirms the principle that "courts should not create new remedies where Congress has provided explicit remedies by statute . . . ." Opp. at n.6 But *Transamerica* also recognized that entertaining a defense is not the same as creating a remedy. Thus—drawing the very distinction that eludes Respondents—the Court said that, regardless whether a statute declaring certain contracts "void" creates a private cause of action for relief from a proscribed contract, at "the very least" the statute "could be raised *defensively* in private litigation *to preclude the enforcement* of . . . [such] contract." 444 U.S. at 18 (emphasis added). *See* Pet. at 17.

[6] Opp. at 7-11.

[7] *See* Pet. at 6 & n.8.

ment, on the other hand, would simply have added avoidance of that lawful agreement to the statutory treble damage and injunction remedies that were available to the defendant for any injury it may have suffered on account of the illegal nondelivery agreement. *Kelly* was thus not at all concerned with the *defense* of illegality of the purchase contract that the plaintiff had sued to enforce. The issue in that case was rather whether nonenforcement of the legal contract was an appropriate *remedy* for the collateral illegality of the nondelivery agreement.

This case, in contrast, does concern the illegality defense.[8] Here, Respondents seek to enforce the very contract provision that is alleged to violate the antitrust laws. Enforcement of that provision would both consummate the antitrust violation and inflict antitrust injury upon Kaiser Steel. But nonenforcement, far from creating additional remedies, would prevent consummation of the antitrust violation and the resultant antitrust injury, and thus the need for any antitrust remedy at all.

Kelly is thus very different from this case. Properly understood, it supports Kaiser Steel's position, for *Kelly* said that the defendant would have been permitted to

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[8] This case is very much like *Bement* v. *National Harrow Co.*, 186 U.S. 70 (1902). In that case, the plaintiff sought to enforce two contracts that the defendant alleged violated the antitrust laws. Plaintiff argued that defendant was restricted to the injunctive and damage remedies provided by statute and thus could not raise the illegality defense. The Supreme Court rejected plaintiff's argument on the ground that, even

> "[a]ssuming that the plaintiff is right so far as regards any suit brought under [the antitrust] act, we are nevertheless of the opinion that any one sued upon a contract may set up as a defence that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defence to the action." *Id.* at 88.

The statutory "right to sue," the Court repeated, "does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defence . . . ." *Id.*

raise the illegality defense if the plaintiff had sued to enforce the illegal nondelivery agreement: That agreement, said the Court, "could not be enforced . . . ." 358 U.S. at 521. The court of appeals' decision and Respondents' Opposition demonstrate, however, that there is substantial confusion about the meaning of *Kelly* and the continued vitality of the illegality defense. This Court should grant certiorari to clarify this important issue.

b. *The Labor Law Defense*

With respect to Kaiser Steel's defense that the purchase-of-coal clause is unenforceable because it violates Section 8(e) of the Labor-Management Relations Act ("LMRA"), Respondents similarly argue that "[t]he remedy Congress defined for alleged Section 8(e) violations is the filing of a charge with the NLRB."[9] Once again, Respondents have confused remedies with defenses. The issue in this case is not whether the NLRB has exclusive jurisdiction to grant remedies to parties who wish to redress violations of Section 8(e). Rather, the issue here is whether a federal court is precluded from first determining whether a contract clause is unlawful before it grants to the plaintiffs a remedy of specific performance.

Section 8(e) addresses this issue directly: It declares that hot cargo clauses are "unenforcible and void." 29 U.S.C. § 158(e).[10] But even if the statute were silent on the enforceability of hot cargo clauses, Respondents'

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[9] Opp. at 12-13.

[10] Respondents ignore this statutory language and focus instead on a different part of Section 8(e) that makes entering into a hot cargo agreement "an unfair labor practice." Opp. at 11. But both clauses of Section 8(e) must be taken into account. Section 8(e) *"not only* makes it an unfair labor practice to enter into a 'hot cargo' agreement, *but also,* makes it clear that such contracts are *'void and unenforcible.'"* National Labor Relations Board, 2 Legislative History of Labor-Management Reporting and Disclosure Act of 1959 at 1523 (1959) (emphasis added). Section 8(e) thus does more than make hot cargo clauses just another species of unfair labor practice; it declares that such clauses are void *ab initio* and are at all times unenforceable by the federal courts. *See* Pet. at 17-19.

argument and the court of appeals' decision would be wrong. Traditional notions of exclusive jurisdiction to grant remedies do not apply to issues that are raised by a defendant in the forum of the plaintiff's choosing. Thus, as this Court has recognized, a court may decide the merits of a defendant's claim that a contract which the court is called upon to enforce violates the law, even if that question would normally lie within the exclusive jurisdiction of another forum.[11]

Although it arose in somewhat different circumstances, *Connell Construction Co.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975), reflects these principles. In *Connell*, this Court decided the legality of a contract clause under Section 8(e) notwithstanding the NLRB's primary jurisdiction to pass on unfair labor practice charges under that Section. It did so because in that case, like this one, the Section 8(e) issue arose as a defense in an action "brought under independent federal remedies" and the Court was not asked to provide a remedy for a labor law violation.[12]

Respondents' answer to the suggestion in Kaiser Steel's Petition that the court of appeals' construction of the LMRA renders it unconstitutional similarly confuses de-

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[11] *See Vendo Co.* v. *Lektro-Vend Corp.*, 433 U.S. 623, 635-36 n.6 (1977) (a party may allege a violation of the federal antitrust laws as a defense to a state court contract action even though federal courts have exclusive jurisdiction over federal antitrust claims). *See also Lyons* v. *Westinghouse Elec. Corp.*, 222 F.2d 184, 190 (2d Cir.) (L. Hand, J.), *cert. denied*, 350 U.S. 825 (1955); Pet. at 19 & n.29.

[12] 421 U.S. at 626. Respondents seek to distinguish *Connell* by asserting that there "the union was not claiming that an unfair labor practice had been committed." Opp. at 14. That is true but irrelevant. In *Connell*, the employer argued (successfully) that the contract clause violated Section 8(e) in response to the union's defense that the clause was sanctioned by Section 8(e) and thus immune from antitrust scrutiny. The fact that the union did not claim that an unfair labor practice had been committed has no bearing on the Court's holding that a federal court may in the first instance decide whether a contract provision comports with Section 8(e) when the issue arises as a defense in an action seeking a remedy under a different statute.

fenses and remedies.[13] Respondents argue that "[t]he remedy that Congress determined to provide" for unfair labor practice charges "was placed in the hands of the National Labor Relations Board," that Congress decided not to create a private right of action for unfair labor practices, and that the constitutionality of that decision has been upheld.[14]

Respondents' argument misses the point entirely. This case does not call into question the constitutionality of Congress' decision to make the NLRB the exclusive forum for obtaining remedies for unfair labor practices. Rather, this case concerns the defenses that Kaiser Steel may raise when the power of a federal court is invoked to enforce an illegal contract clause. Article III of the Constitution ensures that federal courts are free fully to decide cases over which Congress gave them jurisdiction, insulated from control by the legislature, and it renders suspect the court of appeals' conclusion here that the LMRA both requires federal courts to enforce labor contracts that have not previously been subject to judicial review and prohibits those courts from examining their legality when that issue is raised as a defense.[15]

Respondents are correct when they point out that the Supreme Court has never decided a case precisely like this one.[16] The court of appeals tried to fill the gap in this Court's prior decisions in accordance with its conception of public policy. But its decision is not faithful to the statute, the prior decisions of this Court, or the

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[13] Respondents suggest that Kaiser Steel has improperly raised this constitutional issue for the first time in this Court (Opp. at 19-20), but that is not the case. From its inception, this case has concerned the proper construction of the LMRA. It is the court of appeals' construction, which is different from the construction urged by Respondents below, that gives rise to the constitutional problem, and we have pointed out that problem in support of our contention that the court of appeals' construction of the statute is incorrect. The issue arose for the first time after the court of appeals' decision, and it is properly before this Court.

[14] Opp. at 17-19.

[15] *See* Pet. at 20-22.

[16] *See* Opp. at 14-15.

Constitution. This Court should grant certiorari to reverse the court of appeals and clarify this area of labor law.

2. There Is a Conflict in the Circuits Concerning the Jurisdiction of Federal Courts To Decide Whether Contract Provisions Violate the LMRA.

Respondents argue that the court of appeals' decision is in accord with the decisions of all other circuit courts that have decided (or at least correctly decided) the Section 8(e) issue presented in this case.[17] The contrary decisions of the Second and First Circuits, Respondents argue, either addressed the jurisdictional issue "in another context" or "never reached or decided" the issue.[18] But the conflicting conclusions that the courts have reached regarding the power of a federal court to decide the legality of a contract clause under Section 8(a) cannot be explained away so easily.

—In *United Optical Workers Union Local 408* v. *Sterling Optical Co.*, 500 F.2d 220 (2d Cir. 1974), and *Todd Shipyards Corp.* v. *Industrial Union of Marine and Shipbuilding Workers Local 39*, 344 F.2d 107 (2d Cir. 1965), the Second Circuit held that a federal court had jurisdiction to determine whether a contract violated Section 8(e) and was thus unenforceable, even though the party asserting its illegality had not taken his complaint to the NLRB.[19] More recently, in *Perma-Line*

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[17] *Id.* at 20-21.

[18] *Id.* at 22, 23. Respondents also note, correctly, that the Ninth Circuit in holding, and the Third Circuit in dictum, agree with the court of appeals in this case. *See id.* at 20-21.

[19] Pet. at 23-24. Respondents do not dispute this reading of *Todd Shipyards*. They would distinguish *United Optical Workers* on the basis of the court's dictum that, had the union appealed, it would not have decided the Section 8(e) issue until after arbitration. That dictum, of course, neither impairs the significance of *Todd Shipyards* nor gives any support to Respondents' contention here that the NLRB has exclusive jurisdiction, and the federal courts have no jurisdiction, to decide whether contracts violate Section 8(e).

Corp. v. *Sign Pictorial & Display Local 230*, 639 F.2d 890 (2d Cir. 1981), the Second Circuit held that a federal court may decide whether a contract clause violates Sections 8(a)(3) and 8(b)(2) of the LMRA in an action brought to enforce an arbitration award, even though the NLRB had never been asked to find the clause illegal.[20]

—In *Local 1896, IAM* v. *Brake and Electric Sales Corp.*, 279 F.2d 590 (1st Cir. 1960), the First Circuit affirmed a district court judgment that decided in the first instance issues arising under Section 8(a)(3) of the LMRA. In that case, like this one, plaintiffs sued for breach of contract; in defense the employer argued that the contract clause could not be construed as plaintiffs contended because such a construction would violate Section 8(a)(3). The district court agreed with the employer, even though the NLRB had not been asked or decided under what circumstances compliance with the clause would be illegal.[21]

—In *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 629 F.2d 653 (10th Cir. 1980), the Tenth Circuit remanded for further factual proceedings a district court decision that a provision in a collective bargaining agreement violated Section 8(e). The court of appeals did not question the power of the district court to decide the Section 8(e) issue, even though the employer challenging the agreement had not taken his grievance to the NLRB.[22]

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[20] *Perma-Line* was decided on January 23, 1981, and published in advance sheet form on April 6, 1981.

[21] Respondents would distinguish this case on the ground that the First Circuit based its affirmance on the district court's finding that the contract had not been breached. But the decision whether the clause had been breached depended on how the clause was construed, and the court of appeals accepted the district court's construction. *See* 279 F.2d at 592 & n.2. The First Circuit thus clearly recognized that a federal court may decide labor law issues in the first instance when they arise as defenses in contract enforcement actions.

[22] *Frito-Lay* was not finally decided by the Tenth Circuit until October 15, 1980, after the court of appeals' decision in this case. We did not learn of the case until after we filed our Petition.

In sum, six circuit courts have considered whether and when federal courts may determine the lawfulness of contract clauses under the labor laws. They have reached differing and conflicting conclusions. This Court should grant certiorari to resolve the conflict among the circuits.

3. The Court of Appeals' Incorrect Attorneys' Fee Decision Should Not Be Left Standing.

In defending the court of appeals' award of attorneys' fees, Respondents rely on a new statutory provision.[23] But that provision was enacted after the court of appeals' decision, and the new statute itself provides that it has no application to this case.[24] Passage of the new law actually confirms that the fee award in this case was not authorized by the applicable federal statutes.[25] This Court should reverse the court of appeals' erroneous decision to award attorneys' fees without statutory authority.

CONCLUSION

For the reasons stated above and in our Petition for Certiorari, the writ should be granted.

Respectfully submitted,

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[23] Opp. at 25-26.

[24] *See* Section 108(e)(1), Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, 94 Stat. 1208 (1980).

[25] *See* 1A Sutheland Statutes and Statutory Construction 179, 178 (C. Sands ed. 1972) (It can be inferred from the enactment of the new amendment that such provision was not included in the original act and that Congress "intended to change the original act by creating a new right").